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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/524,174

03/03/2006

Frederic Fortin

3338.62US01

2469

24113 7590 12/22/2008  
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EXAMINER

FISHER, ELANA BETH

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

12/22/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/524,174	<b>Applicant(s)</b> FORTIN ET AL.	
	<b>Examiner</b> ELANA B. FISHER	<b>Art Unit</b> 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 March 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 7-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 7-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 03 March 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>03/03/2006</u> .  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Drawings***

1. New corrected drawings in compliance with 37 CFR 1.121(d) are required in this application for the following reasons:
  - i. The drawings submitted to do not contain the full subject matter disclosed in the application, which would aid in the examination process. Figures 1-2 were submitted, however the disclosure states there are 9 figures in total.
  - ii. The drawings submitted are not acceptable for examination as they contain parts which are drawn by hand and are therefore not as clear as applicant is capable of providing.
  - iii. The specification refers to numbers that are not shown in the drawings (i.e. 36c pertains to a rod), which hinders the examination process.

Applicant is advised to employ the services of a competent patent draftsman outside the Office, as the U.S. Patent and Trademark Office no longer prepares new drawings. The corrected drawings are required in reply to the Office action to avoid abandonment of the application. The requirement for corrected drawings will not be held in abeyance.

### ***Claim Rejections - 35 USC § 101***

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.
3. Claims 7-12 are rejected under 35 U.S.C. 101 because they are drawn to non-statutory subject matter. In claim 1, lines 4-5, applicant positively recites part of a human, i.e. "the distraction and cushioning device anchored to the bone structure". Thus claims 7-12

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include a human within their scope and are non-statutory. A claim directed to or including within its scope a human is not considered to be patentable subject matter under 35 U.S.C. 101. The grant of a limited, but exclusive property right in a human being is prohibited by the Constitution. *In re Wakefield*, 422 F.2d 897, 164 USPQ 636 (CCPA 1970).

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 7-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fortin (WIPO Publication 2000/72768 A1), and further in view of Zacouto et al. (U.S. Publication 2002/0151978).

a. Regarding claims 7-12, Fortin discloses a distraction device including first and second rods mounted on an adjusting means comprising first and second screws (FIG 13), the device capable of being anchored to a bone structure by respective ends of the rods connected to an anchoring means (FIG 13); at least one toothed rod (FIG 12), wherein the device is adapted to straighten and support the trunk of a child, including the spine, by adjustment of the adjusting means and the first and second screws; cushion dynamic stresses; be adjusted as many times as necessary to accommodate growth; and avoid creating significant stress in the bone structure, including around the anchoring means, while not inhibiting growth. The first, second, and at least one toothed rods are rectilinear

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(FIG 9). The first, second, and at least one toothed rods are curvilinear and are adapted to lengthen the anchoring means of the distraction and cushioning device along suitable curved trajectories (FIG 13). Furthermore, the first, second, and at least one toothed rods are curvilinear or curved at various radii, thereby adapted to avoid causing injury to nearby tissues and to restore or respect anatomical curvatures of the trunk during lengthening (FIG 13), and as a result of multiple available combinations of the distraction device and the cushioning device, the distraction and cushioning device is adapted to be placed along the trunk or the spine to follow development and promote straightening.

However, Fortin fails to disclose a cushioning device as part of the distraction device. Zacouto et al. disclose a distraction and cushioning device (FIG 1a) comprising at least one cushioning device comprising flexible means and rigid means (9) wherein an end of at least one rod (8), which connects to the cushioning device, has a piston head shape (FIG 1a); furthermore, one end of the rod (8) including a cylindrical plate (10) integrated with a visco-elastic means and a rigid means of the cushioning device (Paragraph [0226]) and capable of cushioning the distraction and cushioning device and promoting joining with a vertebra by a screw set on the rigid means while being out of alignment with the distraction device. It therefore would have been obvious to one skilled in the art to modify the distraction device taught by Fortin, to add a cushioning device to the end of at least one toothed rod, as is taught by Zacouto et al. because the cushioning device can act as a shock absorber, aiding in the dampening of stresses and strains put on the distraction device as movement occurs in the body.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELANA B. FISHER whose telephone number is (571)270-3643. The examiner can normally be reached on Monday through Friday from 8:30AM to 5:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571)272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Elana B Fisher/  
Examiner, Art Unit 3733  
/Eduardo C. Robert/  
Supervisory Patent Examiner, Art Unit 3733